Supreme Court of the United States

October Term, 1957

No. 69

SAFEWAY STORES, INCORPORATED,
a corporation

Petitioner,

vs.

HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Brief of Respondent

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BRIEF OF RESPONDENT

REFERENCE TO REPORTS OF LOWER COURTS

The opinion of the United States District Court for the District of New Mexico is reported in 137 F. Supp. 841 and reproduced in the Record beginning at page 8. The opinion of the Court of Appeals, Tenth Circuit, is reported in 239 F. 2d. 144 and is printed in the Record beginning at page 30.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was dated November 6, 1956, and entered on that date (R. 34). The Petition for Rehearing was filed November 26, 1956, (R. 34) and denied December 4, 1956, (R. 42). Petition for Certiorari was filed January 22, 1957, and granted by this Court March 4, 1957, (R. 42).

Jurisdiction of this Court was invoked by Petitioners under 28 USC, Sec. 1254 (1).

THE QUESTION PRESENTED FOR REVIEW

The question for review is whether a person injured in his business and property by violation of Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 USC 13a) may sue for and recover treble damages for such injury under Section 4 of the Clayton Act (38 Stat. 731, 15 USC 15).

STATUTORY PROVISIONS INVOLVED

The Statutory provisions involved, quoted in Appendix I of this brief, are as follows:

Robinson-Patman Act,
49 Stat. 1528

Clayton Act, Section 4,
38 Stat. 731, 15 USC 15

Clayton Act, Section 1,
38 Stat. 730, (1st paragraph)

Title 15 USC 12 (1st paragraph)

STATEMENT OF THE CASE

The District Court dismissed Plaintiff's first Amended Complaint, which may be summarized as follows (R. 1-5):

Plaintiff Vance is the Trustee in Bankruptcy of one Frank Melvin Thompson, who operated a retail grocery store in Albuquerque, New Mexico from the year 1948 until the month of May, 1955.

Defendant Safeway Stores, Inc., is the second largest food chain in the United States, operating more than two thousand supermarkets in the United States and in Canada, with sales in 1954 of over $1,600,000,000, employing over 49,000 persons, and owning and operating various warehouses, bakeries, candy plants, milk plants and similar food processing establishments. Defendant ships its food products in interstate commerce from its processing and warehousing facilities described in the Complaint to its supermarkets in Albuquerque, New Mexico, where they are sold to consumers and others. (R.2)

Defendant is the dominant distributor and retailer of food products in West Texas and New Mexico, supplying its stores in New Mexico from warehouse facilities it operates in El Paso, Texas. By reason of Defendant's financial resources, extensive processing and warehousing, its facilities located throughout the United States, and its dominant position as a food distibutor and retailer in West Texas and New Mexico, defendant was and is able to destroy competition in the City of Albuquerque at the will of its management. (R. 3).

Between September 1, 1954, to the date of filing of the Complaint (November 15, 1955), defendant, at the direction of its management located in El Paso, Texas, and Oakland, California, sold goods in the course of interstate commerce in its Albuquerque stores, at prices substantially lower than prices exacted by defendant for the same goods in other cities and towns in New Mexico and elsewhere in the United States, for the purpose of destroying competition in the grocery business in Albuquerque, in violation of Section 3

of the Robinson-Patman Act (15 USC 13a) and Section 4 of the Clayton Act as amended (15 USC 15) (R. 3). Defendant further sold goods in the course of such commerce in the city of Albuquerque at unreasonably low prices during the period mentioned, for the purpose of destroying competition in said city, in violation of the statutes cited (R. 4). Defendant engaged in a policy of selling certain staple articles of food, important in the budget of every housewife, and constituting a substantial portion of total volume of sales in the industry, at unreasonably low prices over a period of over six months, with the knowledge and intent that such action would destroy a number of defendant's smaller competitors in Albuquerque. As a proximate result of defendant's illegal actions a number of defendant's competitors, including Thompson, were destroyed. Further, as a proximate result of defendant's unlawful actions, Thompson lost business and profits in 1954 and 1955, and in May, 1955, he became insolvent and lost his business and all his non-exempt personal and real property.

The Complaint concludes with a prayer for judgment for $45,000.00 trebled, and for other relief.

The proceedings in the District Court upon dismissal of Plaintiff's First Amended Complaint and the proceedings on appeal to the Circuit Court of Appeals were as stated in the Petitioner's brief, pages 4 and 5.

SUMMARY OF ARGUMENT

I.

The text of the Robinson-Patman Act indicates that it was intended in its entirety to amend the Clayton Act, and as an amendment of the Clayton Act, it is one of the "anti-trust laws" specified in Section 1 of the Clayton Act (38

Stat. 730) as a result of the violation of which a person injured may recover treble damages under Section 4 of the latter act." (38 Stat. 731, 15 USC 15).

II.

Without regard to the express langauge of the Robinson-Patman Act, its history, studied in the light of experience under the Sherman and Clayton Acts, indicates that it was amendatory of existing antitrust laws, particularly the Clayton Act. The Robinson-Patman Act was a continuation of the Congressional attack upon the evils of combinations, monopolies and restraints of trade, with particular emphasis upon the widespread practice of the chain stores of soliciting special discounts and allowances, and of engaging in local price wars. See *Final Report on the Chain-Store Investigation*, Sen. Doc. No. 4, 74th Cong., 1st Sess. (1934); American Law Institute, *Price Discrimination*, 1953 Ed., pp. 8 to 12. The Robinson-Patman Act was particularly designed to protect the independent merchant and the public from exploitation by his chain competitor. (Rep. Patman, 79 *Cong. Rec.* 9078). Section 3 of the Act prohibited not only practices which were expressly the subject matter of existing antitrust laws, but also practices, such as locality discrimination and sale of goods at unreasonably low prices with the intent to destroy competition, which Congress had condemned in debates on earlier antitrust statutes, but which had not been adequately covered under such earlier laws. Section 3 should, therefore, in the light of history, be considered an integral part of an act, which, as a whole, amended existing antitrust laws.

III.

The statement in Section 1 of the Clayton Act, 38 Stat. 370, that "antitrust laws" as used therein "includes"

the acts specifically referred to in that section (being all the then existing laws dealing with antitrust) was not intended by Congress as an all-embracing definition which would exclude later enactments. See *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). The debate on certain sections of the Clayton Act appearing in the Congressional Record in Volume 51, page 16319, makes it clear that the specification of the then existing antitrust laws contained in Section 1 was not inserted with the intention of excluding any act which would ordinarily be classified as an antitrust act, but to ensure that enforcement orders of the Federal Trade Commission would not have the effect of absolving a violator from liability under other provisions of the antitrust laws.

IV.

Inclusion of Section 3 of the Robinson-Patman Act as one of the antitrust laws in the codification of Section 1 of the Clayton Act published in 1940 (15 USC § 12) and its continuation in subsequent codes constitutes an established administrative interpretation which is entitled to great weight. Petitioner's characterization of this as a "codification error" (Br. 14) begs the question presented for review.

V.

The Federal district courts have almost without exception held Section 3 of the Robinson-Patman Act as one of the "antitrust laws" for the violation of which the treble damage remedy is available to a person injured. In two cases in which the issue was not directly before it, this Court has indicated agreement with that construction. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 750 (1947), *Moore v. Mead's Fine Bread*, 348 U.S. 115, 118 (1954).

ARGUMENT

I.

THE ROBINSON-PATMAN ACT IN ITS ENTIRETY AMENDS THE CLAYTON ACT.

If the Robinson-Patman Act in its entirety amends the Clayton Act (or any other "antitrust law"), then of course it is part and parcel of the law it amends and each of its parts is an "antitrust law", the violation of which subjects the guilty part to treble damages under Section 4 of the Clayton Act.

Petitioner argues that the text, punctation and structure of the Robinson-Patman Act indicate that it was not intended as an amendment of the Clayton Act (Br. 6-20). The argument rests upon the assumption that the language of the enacting clause expressly limits the amendment of the Clayton Act to Section 2 thereof (Br. 19), that only the portion enclosed in quotation marks can constitute an amendment (Br. 17), and that the title states that the intended amendment is limited to Section 2 of the Clayton Act. (Br. 18).

A close examination of Sections 2 and 4 of the Robinson-Patman Act leads to the conclusion that the argument is clearly wrong. Section 2 of the latter act expressly refers to the Clayton Act, stating that nothing in the section shall affect rights of action or orders of the Federal Trade Commission based on Section 2 of the Clayton Act, pending prior to "this amendatory Act." It provides that in the event the Commission has reason to believe that a person subject to a cease and desist order under the Clayton Act has committed any act violative of Section 2 of the latter act "as amended by this Act", it may reopen the

original proceedings and issue a supplementary complaint, which shall be conducted as provided in Section 11 of the Clayton Act. If, upon such hearing, the Commission shall be of the opinion that any act charged in the supplementary complaint has been committed since the effective date of "this amendatory Act", in violation of Section 2 "as amended by this Act", it is directed to issue an order modifying or amending the original order to include any additional violations found. The provisions of Section 11 of the Clayton Act as to review and enforcement of orders of the Commission are to apply to such amended order.

It is thus apparent that Section 2 of the Robinson-Patman Act is amendatory to the Clayton Act. The provisions of Section 11 of the Clayton Act are expressly amended to provide that they shall apply to amended orders of the Federal Trade Commission issued under the authority of Section 2 of the Robinson-Patman Act. The latter statute in its entirety is referred to as "this amendatory Act". Similarly, Section 4 of the Robinson-Patman Act exempts co-operative associations which might otherwise be subject to Section 2 of the Clayton Act as amended by Section 1 of the Robinson-Patman Act, and which might otherwise be subject to the penalties imposed by other sections of the Clayton Act were the exemption not granted.

Both of these sections have the effect of altering the Clayton Act "to make it more complete or perfect" and to "fit it the better to accomplish the object or purpose for which it was made", and are amendatory within the definition of *United States ex rel. Palmer v. Lapp*, 244 Fed. 377, 383 (6th Cir. 1917); *First State Bank of Shelby v. Bottineau County Bank*, 56 Mont. 363, 185 Pac. 162 (1919) and other cases. See *Rupert Hermanos v. People of Puerto Rico*, 106 F. 2d 754 (1st Cir. 1939). Whether an act is amendatory of existing law is determined not by the title or by declara-

tion in the new act that it purports to amend existing law, but by an examination and comparison of its provisions with existing law. *People ex rel. Larson v. Thompson*, 381 Ill. 48, 44 N.E. 2d 899 (1942); *Auk Bay Salmon Canning Co. v. U. S.*, 300 Fed. 907, 910 (9th Cir. 1924); *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796, 799 (S.D. Cal. 1950).

Since Sections 2 and 4 of the Robinson-Patman Act are clearly amendatory of the Clayton Act, Section 3 must also be considered amendatory of that Act, since all sections of the Robinson-Patman act are integrated parts of the whole. Examination of the background of the Act supports this conclusion.

II.

THE HISTORY OF THE ROBINSON-PATMAN ACT INDICATES IT WAS INTENDED TO SUPPLEMENT AND AMEND EXISTING ANTITRUST LAWS.

This Court said in *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, 248 (1951):

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monoply, which it sought to prevent.'"

As Judge Yankwich pointed out in his exhaustive opinion in *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796, 803, antitrust legislation in the United States shows a consistent attempt to achieve a maintenance of competition in our economy through the use of the power of Congress to regulate commerce between the states. The

Sherman, Clayton and Robinson-Patman Acts are successive steps in the condemnation of practices which earlier statutes failed to reach.

One of the most destructive practices which the Sherman Act failed to prevent was that of local underselling, which is precisely the practice complained of against Safeway here. The Judiciary Committee of the House of Representatives, in reporting the Clayton Act to the House on May 6, 1914, stated with respect to Section 2 as reported out to the House (H.R. Report No. 627, 63rd Cong., 2d Sess., 1914):

> "Section 2****** is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monoply in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. *** ".

Section 2 of the Clayton Act as reported out by the Committee and as originally passed by the House read in part as follows (51 Cong. Rec. 16043):

> "Sec. 2. That any person engaged in commerce who shall either directly or indirectly discriminate in price between different purchasers of commodities in the same or different sections or communities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States with the purpose or intent thereby to destroy or wrong-

fully injure the business of a competitor of either such purchaser or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding $5000, or by imprisonment not exceeding one year, or by both, in the discretion of the court."

The conference bill (See 51 Cong. Rec. 16267) changed the section to read as it finally was enacted, 38 Stat. 730, as follows:

"Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. *Provided* that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; *And provided further* that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

It is significant in determining whether Section 3 of the Robinson-Patman Act was intended as an amendment to the Clayton Act to note that the original Section 2 of the latter act more nearly resembles portions of the Borah-Van

Nuys provision than it does the final version of Section 2. It was apparent to many members of Congress that the conference version of Section 2 would prove to be inadequate to deal with the condition of local underselling. Senator Norris described the problem during the debate on the conference report on the Clayton Act on October 2, 1914, as follows (51 Cong. Rec. 16043):

> "Mr. President, the iniquity that this section seeks to cover is one of the worst that has been in existence in our country. It is one of the principal means by which great trusts and combinations have been built up, and by which enormous fortunes have been made at the expense of the consuming public. It was the main method by which the Standard Oil Co. gained its wealth, and its power; it is a means of discrimination that is paralyzing, that means death and destruction to honest business. The Standard Oil Co. and similar trusts that indulge in this practice have been in the habit of going into some community where they had some competition and there, regardless of cost or of anything else, under-selling their competitor until they had driven him out of business. When they had driven him out of business, or got him in such condition that they were able to buy him out, then the price was raised in that community. While it was often lowered in one community, it was raised in other communities; so that they could make up their losses and a profit besides. It has been one of the most sinful practices; and the road to these great combinations that have won wealth and power by this means has been strewn all along with the dead and withering bones of honest business, sacrified in an honest attempt to make an honest living. In the end the consuming public has always been compelled to foot the bill."

Senator Norris and Senator Clapp expressed particular dissatisfaction with Section 2 as it finally came before the Senate because the criminal provision was eliminated.

and the Senators believed that the section as reported out would not reach locality discrimination, which the House Report, supra, had expressly stated was the primary objective of Section 2.

The following remarks were made, (51 Cong. Rec. 16044-45):

"MR. CLAPP: The way that section was finally fixed by the conferees there would have been no gum for the tooth to have been imbedded in; because, outside of conference, outside of the action of the two Houses, they inserted this:

> 'Where the effect of such discrimination may be to substantially lessen competition . . .'

Not at the point where the small independent was crushed out, but in the world-wide operations of a trust whose operations encircle the globe.

MR. NORRIS: Yes.

MR. CLAPP: Consequently, with that added, there could be no offense under Section 2, because the crushing out of a man in one town would not even tend to affect the business of a world-wide operation."

Senator Clapp continued during the debate as follows, 51 Cong. Rec. 16054:

"The experience of the country under the Sherman antitrust law had disclosed three great and acute conditions. In the first place, there had been developed and disclosed this condition of local underselling. That is, a trust or combination would enter some some particular locality, put down the price of its article, until it had crushed out the local independent concern, and then restore the price, and the monopoly in that particular place would be complete. The Senator from West Virginia this morning insisted that we have no right to deal with monopoly locally. But the fact is our right to

deal with monopoly does not depend upon the locality where it is attempted to establish the monopoly, but upon the instrumentality that is used and if that instrumentality is interstate commerce, then our jurisdiction over the subject is complete and whole."

After stating that the other two evils referred to were the tying-in contract, and the occasional attitude of a trust in refusing to sell a commodity to any particular individual, the Senator continued:

"Experience had brought out these three matters in bold relief. The court had held that the tying-in contracts, if applied to patented articles, could not be reached under the Sherman antitrust law. The court had enumerated the local underselling as something to be reprehended and as a link in the chain of evidence that might lead to the conclusion that a trust existed.

"If Congress had taken these three distinct matters, which experience had disclosed as evils not fully cured by the Sherman antitrust law, declared each and every one of them to be a misdemeanor and applied a penalty, it would have met the situation for trust legislation. * * *"

As pointed out by the Federal Trade Commission in the *Final Report on the Chain Store Investigation*, *supra*, Senators Clapp and Norris were correct in their predictions. The Clayton Act was ineffective in curbing the power of the chain. The language of the original Section 2 dealt principally with competition with the discriminating seller at the manufacturing or producing level, not competition between customers of the purchaser. See *Mennen Co. v. Federal Trade Comm.*, 288 Fed. 774 (2nd Cir. 1923); but see *Van Camp & Sons v. American Can Co.*, 278 U.S. 245, 254 (1929). It remained doubtful whether injury to an individual merchant competing amounted to a "substantial

lessening of competition" in that line of commerce within the meaning of the section. As the House Judiciary Committee Report on the Patman bill stated (H.R. Rep. 2287, 74th Cong., 2d Sess., p. 8):

> "The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result."

Congressman Patman, in introducing the original bill (which did not, of course, include the Borah-Van Nuys amendment) said (79 Cong. Rec. 9078):

> "This bill is designed to accomplish what so far the Clayton Act has only weakly attempted, namely to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys, from exploitation by his chain competitor.
> The Goliath is the huge chain stores sapping the civic life of local communities * * *."

He stated that the weaknesses of the opponents of the chains were these:

> "Third. The disorganized individualism and hand to-mouth buying habits of the purchasing public, who cannot realize nor foresee — nor indeed resist if they could — the ultimate monopolistic motives concealed beneath the loss-leader prices and other trick merchandising tactics of the chains — practices which, because of their far-flung resources, they can concentrate with more deadly effect in one community at the cost of another."

Mr. Patman's report was based on the Trade Commission's report on chain stores, which emphasized time

and time again that one of the major competitive advantages of the chains was their ability to reduce their prices below their competitors in one locality, while maintaining prices in other communities to recoup any losses suffered. *Final Report of Chain Store Investigation, supra,* pages 34, 38, 50, 51. Existing antitrust laws apparently did not concern their officials.

> "And in this connection it is interesting to note that, although perhaps aware of their existence chain store officials in discussing their price policies make little or no mention of State or Federal laws against price discrimination as influencing or limiting such policies." *Final Report of Chain Store Investigation, supra,* Page 34

The Federal Trade Commission in discussing price competition by the chains, stated in the *Report*, supra, pages 50 and 51:

> "As shown in sections 2 and 3 of this chapter, chains frequently sell the same quality goods at the same time at different prices in their various stores. This manifests itself in the form of leaders and so-called 'loss-leaders' at some stores, in the pricing of private brands, and in differences between the headquarters price and the branch store price on many articles. The ability of chain stores to vary prices among their different branches and thus to average their profits results in one of their chief advantages over independents. * * * This means that chain store systems will probably continue to increase in size and tend more and more toward a monopolistic position. And their legal position will be impregnable under the Supreme Court's view that mere size or possession of monopolistic power without abuse is no violation of the Sherman Act. The only vulnerable spot under existing law is prevention of methods which lead to that result.

"Section 2 of the Clayton Act forbids discrimination in price where the effect 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce'. Variation in price between different branches of a chain would seem to be a discrimination, the effect of which 'may be' to produce the forbidden results. *It is one thing, however, to reach such a broad conclusion on the results of this practice by chains in general and quite another to prevent by legal means its use by some particular chain.*"
(emphasis supplied)

In discussing state legislation dealing with the chain store problem, the report pointed out on page 83 that 31 states had enacted laws making it unlawful to discriminate in price between different sections, communities, or cities of the state, in the sale of any commodity. In discussing the legal remedies available under then existing federal statutes, the report pointed out, with respect to price discriminations, that during the period of most extensive growth of the chains, the Commissioon was prevented by court decisions from making effective use of Section 2 of the Clayton Act and that there remained the question whether substantial lessening of the competition in intrastate retail distribution was within the scope of the state.

The Borah-Van Nuys bill, which later became Sections 3 and 4 of the Robinson-Patman Act, was one of a number of bills considered by Congress, all of which were concerned with implementing the Clayton Act. Thus, Senator Robinson said, (80 Cong. Rec. 6277), in the discussion as to whether the Borah-Van Nuys bill should be incorporated into his bill as an amendment:

"It has been said that there is a large number of measures dealing with this subject pending before the two Houses. There are several bills in the House, and I think there are more than two bills in the Senate, and each

one of those measures reflects difference of opinion as to some details; but the purpose of this proposed legislation runs through all the bills, and that is to correct the defects in the Clayton Antitrust Act which undertook to prevent by law unfair price discriminations which gave to those who had the power to do so the opportunity to destroy their competitors and to gain a monopoly of the business in which they were interested, to the detriment of both dealers and consumers. Those who are sincerely interested in that purpose may stand on a common ground.

"They may differ respecting some details, but if they are earnestly desiring to prevent the building up of monopolies in this country in the trade of the country they may adjust their differences and reach a fair conclusion."

The Borah-Van Nuys bill was considered both in the Senate and the House as a possible substitute for the Robinson and Patman bills. In the debate on the Robinson and Borah-Van Nuys bills in the Senate on April 29, 1936, (80 Cong. Rec. 6330 et seq.), Senator Logan remarked that all the witnesses at the committee hearings had agreed that the Clayton Act should be amended. Senator Austin stated that a great number of the witnesses had expressed preference for the Borah-Van Nuys bill over the Robinson-Patman bill. Senator Logan agreed, and asked id., p. 6333,

"MR. LOGAN: * * * But are not the objectives of the Borah-Van Nuys bill exactly the same as the objectives of the Robinson bill, and is not the only disagreement as to the language used in reaching the objectives?

* * *

MR. BORAH: I think the objectives of the two bills are the same. * * *."

The Borah-Van Nuys bill was offered by Senator Borah

as an amendment to the Robinson bill in the Senate (80 Cong. Rec. 6279), and it was agreed to as an amendment to the committee amendment (80 Cong. Rec. 6351). Senator Logan, Chairman of the Sub-Committee which had considered the Robinson bill, Senator Robinson, its author, and Senator Borah, expressed agreement that "one of the defects of the pending bill (the Robinson bill) is that it imposes no specific penalty for violation of its provisions" (id., at 6348) and "that it does not give the party in interest an adequate remedy in all cases" (id. at 6349). The Borah-Van Nuys bill was accepted by the Senate as an amendment to the Robinson bill (id., at 6351). When the Robinson bill passed the Senate, the Borah-Van Nuys bill appeared as subsection (h) of the proposed amendment of Section 2 of the Clayton Act, and was enclosed in quotation marks. It was thus passed initially by the Senate as a portion of a bill expressly amending Section 2 of the Clayton Act.

In the House, the Borah-Van Nuys bill was first introduced by Congressman Healy of Massachusetts on May 28, 1936, as a *substitute* for the Patman bill (id., at 8227). In introducing the amendment (which was rejected at that time by the House) Mr. Healey said:

> "The Borah-Van Nuys bill is the only bill that has been offered on this subject, in my judgment, that does not directly or indirectly fix prices. It therefore more nearly conforms to the spirit of the Clayton Antitrust Act than many of the provisions of the bill (the Patman bill) under discussion."

The House passed the Patman bill, H.R. 8442 on May 28, 1936, (id., at 8242), and sent its bill to the Senate (id., at 8279), without taking notice of the Senate bill. Senator Robinson, noting that that was a parliamentary practice which "is inexplicable, because it requires the Senate to

pass the bill twice" (id., at 8403), advised that he would strike out all after the enacting clause of the House bill and insert thereof the language of the bill passed by the Senate. This was done (id., at 8419), and H.R. 8442 as so amended was passed on June 1, 1936. Senators Logan, Van Nuys, McGill, Borah and Austin were appointed conferees for the Senate, (id., at 8419); and Congressmen Utterback, Miller, Celler, McLaughlin, Sumners, Guyer and Robsion for the House, (id., at 8617).

The House conferees accepted the Borah-Van Nuys provision, but separated it from the portion of the bill which expressly amended Section 2 of the Clayton Act, and set it out, excepting for the paragraph relating to co-operatives, as Section 3 of the conference bill. The paragraph relating to co-operatives was set forth as Section 4 of the conference bill. The conference report on Section 3 stated in substance that the section did not affect the scope or operations of the prohibitions laid down by "the Clayton Act amendment provided for in Section 1"; that most of the acts prohibited also lay within the prohibitions of Section 1, as amended; that the section "merely attaches to them its criminal penalties in addition to the civil penalties and remedies already provided by the Clayton Act." (id., 9419)

The following discussion of the conference report took place in the House (id., 9420):

> "MR. CELLER: Also let me point out that this bill is an amendment to the Clayton Act, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of the discrimination. In addition, for the same act of discrimination, to the triple damages the businessman accused can, by Section 3 of this bill, be hailed to court and fined $5,000

or imprisoned for 1 year. I ask you to think carefully before you accept such a bill with such penalties.

* * *

MR. HANCOCK *of New York:* If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?

MR. CELLER: If he violates the Borah-Van Nuys provision or the other provision of the bill, he is subject to penalties of a criminal nature and has committed an offense.

MR. HANCOCK *of New York:* Would he also be liable for triple damages?

MR. CELLER: And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue."

Petitioner concludes from the above discussion and from the portion of the debate quoted at pages 27 to 29 of the Brief in Chief, that it was intended that the treble damage remedy under the Clayton Act be separate and distinct from the criminal penalties of Section 3 of the Robinson-Patman bill. What Mr. Miller was actually trying to make clear was that the criminal penalties were separate and distinct and applied only to violations of Section 3 of the latter act. In the course of his remarks, however, he makes his views clear that he assumed, as did Mr. Celler and others, that the triple damage remedy was applicable to violations of Section 3, as well as to violations of the first section of the bill.

It is further obvious from the following remarks of Senator Van Nuys (id., 9903), one of the authors of Section 3, that he considered the treble damage remedy applicable to that section:

"MR. VANDENBURG: Mr. President, I should like

to ask the Senator from Indiana one or two questions about the conference report.

The fact has been called to my attention that *Section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages*, while similar discriminations under section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2 (b) is not permitted under section 3, although the act or the offense would be the same. (emphasis supplied)

MR. VAN NUYS: I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law. If a prima facie case is made against an alleged unfair practice, the respondent may rebut the prima facie case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law."

If Senator Vandenburg had been incorrect in his assumption that "section 3 * * * makes certain discriminations * * * also subject to treble damages", Senator Van Nuys would have certainly corrected such a serious error.

Thus, it is submitted, the history of the Robinson Patman Act, considered in the light of experience in antitrust enforcement under the Clayton Act, makes it clear that Section 3 was an integral part of the Robinson-Patman Act, that the entire act was intended to amend the Clayton Act, and that the triple damage remedy, which has always been an important adjunct of antitrust law enforcement [Radovich v. National Football League, 352 U.S. 445, (1957)] was intended to be available to persons injured by violations of Section 3.

III.

THE SPECIFICATION OF CERTAIN ANTITRUST LAWS IN SECTION 1 OF THE CLAYTON ACT WAS NOT INTENDED TO EXCLUDE LATER ENACTMENTS IN THE ANTITRUST FIELD.

The statement in Section 1 of the Clayton Act, 38 Stat. 370, that "antitrust laws" as used therein "includes" the acts specifically referred to in that section, which were all the then existing laws in that field, was not intended by Congress as an all-embracing definition which would exclude later enactments whose purpose was the protection of competition and the prevention of monoply.

This Court has pointed out several times that the word "including" is not all-embracing, and unless a contrary intent of the users of the word is clear, it is merely illustrative, and does not have the effect of excluding matters in the general category.

In *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), the State of North Dakota sought to impose a sales tax on purchases of the Federal Land Bank of St. Paul for repair of properties acquired on foreclosure. Section 25 of the Federal Farm Loan Act of July 17, 1916, 39 Stat. 360, 380, provided in part:

> "That every Federal Land Bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal and local taxation, except taxes upon real estate held, purchased or taken by said bank or association under the provisions of section eleven and section thirteen of this Act."

The Supreme Court of North Dakota had affirmed the

judgment of the trial court imposing the tax [70 N. D. 607, 297 N.W. 42, 52 (1941)], holding, as petitioner argues here,

> "When Congress used the word 'including' it sought to define exactly what was exempted * * *"

This Court, in reversing the judgment and holding that the purchasers were exempt from tax, stated, 314 U.S. 99:

> "The unqualified term 'taxation' used in § 26 clearly encompasses within its scope a sales tax such as the instant one, and this conclusion is confirmed by the structure of the section. In reaching the opposite conclusion the court below ignored the plain language, 'That every Federal land bank * * * shall be exempt from Federal, State, municipal, and local taxation,' and seized upon the phrase, 'including the capital and reserve or surplus therein and the income derived therefrom,' as delimiting the scope of the exemption. The protection of § 26 cannot thus be frittered away. *We recently had occasion under other circumstances to point out that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.* Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 189; see also Helvering v. Morgan's, Inc., 293 U.S. 121; 125." (emphasis supplied)

In *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934), the government contended that a taxpayer had forfeited the privilege of taking its tax loss in the year 1927 by making a return for the first five months of 1925 and another return for another period in 1925, and in so doing had used the two succeeding "taxable years" in which losses could be deducted under Section 206 of the Revenue Act of 1926. Section 200 (a) of the statute defining taxable year read as follows:

"The term 'taxable year' means a calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under Section 212 or 232. The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December. The term 'taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. . . ."

This Court held that the separate period within one year before and after affiliation of the taxpayer with another corporation did not constitute two taxable years, so as to preclude the deduction of a net loss for the second full year after affiliation, saying at 293 U.S. 124;

"The provision that the term 'taxable year' 'includes' the period of less than twelve months for which a separate return is made, when read only with its immediate context, is not free from ambiguity. It may be admitted that the term 'includes' may sometimes be taken as synonymous with 'means', and that the subsection may be taken to require, as the Government contends, that a fractional part of a normal taxable year of twelve months for which a return is made shall be treated, for all purposes, as a separate taxable year.

But the phraseology is also open to the construction that the word 'includes' is used as the equivalent of 'comprehends' or 'embraces', and that by it the Section merely adopts a familiar device in aid of statutory construction, by providing that wherever other Sections refer to a "taxable year' that phrase may, if the context requires, be taken also to refer to or to 'include' a fractional part of that taxable year, for which a separate return is made. If the language is so construed and applied here, 'the losses sustained for any

> taxable year' which Section 206 permits to be carried forward would include the loss sustained for the first five months of the taxable year for which the separate return was made, and that loss, as well as any other loss separately reported for the remaining part of the taxable year, not otherwise absorbed, could be carried forward to the taxpayer's next two taxable years, here the calendar years of 1926 and 1927."

Similarly, in *Gray v. Powell*, 314 U.S. 402, 416 (1941), it was said:

> "The definition of disposal as including 'consumption or use by a producer, and any transfer of title by the producer other than by sale' cannot be said to put a meaning on disposal limited to the inclusion."

Petitioner's argument that the remedies provided by Section 4 of the Clayton Act are not applicable to violations of Section 3 of the Robinson-Patman Act would have been tenuous indeed had Congress, in Section 1 of the Clayton Act, not enumerated certain statutes to be included as "antitrust laws." It would have been assumed without question, in the light of the history of the two acts, that the Robinson-Patman Act as a whole was one of the antitrust laws for which the various civil remedies were available to persons injured.

The answer to the question presented for review should then be apparent from a study of the purpose of Congress in specifying the then existing antitrust laws in Section 1 of the Clayton Act. This was clarified by Mr. Floyd, one of the House conferees on the Clayton Act, in his explanation of the conference report, October 8, 1914, 51 Cong. Rec. 16319:

> "MR. FLOYD of Arkansas: ******* Under Section 4 of the bill reported by the conferees any person injured

in his business or property by anything declared to be unlawful in any antitrust law or by this act is entitled to go into any district court without regard to the amount in controversy and recover threefold damages. Is there any leniency in that?

That is a reenactment of Section 7 of the Sherman antitrust law. *******

That is not all. Under section 5 of the bill any private litigant injured by the unlawful acts of any corporation where the Government of the United States has proceeded against such corporation and obtained a judgment, either in a court of law or equity, is allowed the use of that judgment or decree to show the unlawful acts of the combination to the full extent that it would be an estoppel between the Government and the original offender. ********

But that is not all. In section 16, on page 20, is a provision that gives the litigant injured in his business an entirely new remedy, one that he never enjoyed before. ******

This provision in section 16 gives any individual, company, or corporation, damaged in its property or business by the unlawful operation or actions of any corporation or combination the right to go into court and enjoin the doing these unlawful acts, instead of having to wait until the act is done and the business destroyed and then sue for damages. ****** Teeth all taken out of the bill! We have taken, by these provisions, the business public into our confidence as allies of the Government in enforcing the antitrust laws, and given to the business men of the country who are being imposed upon by unlawful combinations remedies by which they can recover their own damages without waiting upon the slow and tortuous course of prosecution on the part of the Government.

But that is not all. There are several other remedies provided in this bill. Under section 11 the violation of sections 2, 3, 7 and 8 may be enforced, respectively,

by the Trade Commission, by the Interstate Commerce Commission, or by the Federal Reserve Board. * * * * * * *"

Mr. Floyd went on to explain that the remedies before the Commission were not exclusive, but cumulative, and not intended to exclude the remedies that existed under the Sherman Law "because under the provisions of the bill that is carefully guarded". The following colloquoy took place (ibid.):

"MR. COOPER: Will the gentleman permit an interruption? He has reached one of the most important points in this discussion, and I would like to ask him a question.

MR. FLOYD of Arkansas: I will yield to the gentleman from Wisconsin.

MR. COOPER: The title of this act is 'An Act to supplement existing laws against unlawful restraint and monopolies and for other purposes.' If I understand the gentleman, it is his contention, in supporting this conference, that the criminal clauses of the Sherman law are still in force and that this act simply supplements them?

MR. FLOYD of Arkansas: Certainly; that is correct.

MR. COOPER: And that those criminal clauses are not repealed?

MR. FLOYD of Arkansas: They are not repealed in any sense—in section 11, as agreed to by the conferees, on page 18 of the comparative print, the following language is found:

> 'No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.'

And the 'antitrust acts' include the Sherman antitrust law, and include the other acts specified in the first

section of this bill, and include everything in this act. Who can contend in the face of that declaration, as the distinguished gentleman from Minnesota did last night, that these provisions amend or affect adversely in some way the Sherman Law? *This saving clause completely settles that controversy as to any and all of the antitrust acts. These sections 2, 3, 7, and 8, are parts of this act, and every section in it are declared to be parts of the antitrust acts.*" (emphasis supplied)

Section 1 of the Act, considered in the light of the paragraph in Section 11, quoted above by Representative Floyd, and a similar provision in Section 7 of the Act, providing that the criminal penalties and the civil remedies otherwise available under the "antitrust laws", should remain unaffected, was the result of the effort of the framers of the Act to answer critics of the bill who contended that the criminal penalties had been removed, and the civil remedies impaired. (See additional remarks of Rep. Floyd, 51 Cong. Rec. 16320). Mr. Floyd's statement that "*This saving clause completely settles this controversy as to any and all of the antitrust laws*" demonstrates conclusively that existing antitrust laws were not specified in Section 1 of the Act for the purpose of limiting the definition to the laws specified, nor to exclude thereby any act that by its purpose should be classed as an antitrust law. The codifiers of the United States Code have recognized this, and the courts have also generally so held.

IV.

CODIFICATION OF SECTION 3 AS ONE OF THE ANTITRUST LAWS CONSTITUTES AN ESTABLISHED ADMINISTRATIVE INTERPRETATION THEREOF.

Additions and supplements of the United States Code have been prepared and published under the supervision

of the Judiciary Committee of the House of Representatives since 1947 (61 Stat. 633). Prior to that time, they were prepared under the supervision of the House Committee on Revision of the Laws. (45 Stat. 1541). Interpretations of the statutes by the codifiers should certainly be of persuasive weight unless an obvious error has been made or unless a different meaning is too clear to be ignored.

The codifiers clearly intended to include Section 3 of the Robinson-Patman Act as one of the antitrust laws. In the 1940 Code, the various sections of the Act were codified as Sections 13a, 13b, 13c, and 21a of Title 15. In none of these sections were the words "antitrust laws" used. The codifiers, therefore, changed the wording of Title 15, § 12 appearing in the 1926 Code as follows:

> "'Antitrust laws', as used in Sections 12-27 of this title, includes Sections 1-27 of this title."

to the following wording of the 1940 Code:

> "'Antitrust laws', as used in Sections 12, 13, 14-21 and 22-27 of this title, includes Sections 1-27 of this title."

Changes in this section, rather than indicating an error on the part of the codifiers, as argued by petitioner, (Br. 14-15), are expressive of an intent to retain all of the Robinson-Patman Act sections as "antitrust laws" within the meaning of Section 12. The changes are certainly not the result of an obvious error, or a lingering on in successive editions of the Code, as in *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 164, note (1942), or *Stephan v. United States*, 319 U.S. 423, 426, (1943). As Judge Yankwich stated in *Balian Ice Cream Co. v. Arden Farms Co., supra*, at page 802, the codifiers had a sound understanding of the relation of the Robinson-Patman Act to pre-

ceding legislation, and considered all its provisions, including Section 3, as amendatory of the Clayton Act.

The designation of Section 3 as one of the antitrust laws for which there is a treble damage remedy under Section 4 of the Clayton Act has been approved, almost without exception, by the United States District Courts (Cases cited infra). This Court has reached the same conclusion. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 750 (1947); and *Moore v. Mead's Fine Bread*, 348 U.S. 115, 118 (1955). Congress has presumably approved this construction, since it has taken no action to change the sections in question. *United States v. Elgin, Joliet & Eastern Railway Company*, 298 U.S. 492, 500, (1936). See *United States v. Dakota-Montana Oil Company*, 288 U.S. 459, 466 (1933).

V.

THE COURTS HAVE GENERALLY HELD THAT TREBLE DAMAGES ARE RECOVERABLE UNDER SECTION 3 OF THE ROBINSON-PATMAN ACT.

Except for the decision of the District Court in the instant case, and that of the Court of Appeals of the Seventh Circuit in *Nashville Milk Company v. Carnation Company*, 238 F. 2d 86, both now before this Court for review, the lower courts have generally held that treble damages were recoverable under Section 3 of the Robinson-Patman Act. *Atlanta Brick Co. v. O'Neal*, 44 F. Supp. 39 (E.D. Tex. 1942); *A. J. Goodman and Son v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass., 1949); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408, (D. Conn., 1950); *Balian Ice Cream Co. v. Arden Farms Co., supra; Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal., 1951); *Wildes Kohinoor,*

Inc. v. Stabile, 140 F. Supp. 916, (S.D. N. Y., 1956). Judge Yankwich's scholarly and exhaustive opinion in *Balian Ice Cream Co. v. Arden Farms Co., supra,* has also been quoted with approval by the Court of Appeals of the Ninth Circuit in *Karseal Corporation v. Richfield Oil Corp.*, 221 F. 2d 358, 365 (1955).

National Used Car Market Report, Inc. v. National Auto Dealers Association, 108 F. Supp. 692, (D.D.C. 1951) cited by petitioner on page 31 of its brief, actually did not decide the question at issue. The Court said at page 694:

> "But assuming, without deciding, that such an action is maintainable under Section 3 of the Robinson-Patman Act, the count still must be dismissed. The Court feels that the allegations of the complaint are merely repetitions of the language of the Statute."

The Court of Appeals of the District of Columbia affirmed the decision of the District Court for the same reason, not as petitioner infers, on the ground that the treble damage remedy is not applicable to a violation of Section 3 of the Robinson-Patman Act. 200 F. 2d 359 (1952).

The authors of the law review notes and comments cited by petitioner either ignore the legislative history of the Robinson-Patman Act, or reach their conclusions on the basis of disagreement with congressional policy, which is not a matter before this court. The Attorney General's National Committee to Study the Antitrust Laws, in its *Report* of March 3, 1955, expresses general distaste for Section 3, and recommends repeal of the section. The conclusions of the various student-authors of law review notes and comments and other writers cited by petitioner have, as we have seen, not been accepted either by the courts or by Congress. Other student-authors have reached the op-

posite conclusion. 32 *N.Y.U. L. Rev.* 1149, (1957); 70 *Harv. L. Rev.* 1490 (1957).

This Court, as mentioned above, has twice indicated, in cases in which the question was not directly raised, that the treble damage remedy was applicable to Section 3. In *Bruce's Juices, Inc. v. American Can Co., supra* at page 750, it was said:

> "The Act prescribed sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, c. 592, 15 U.S.C.A. § 13a, 4 FCA, title 15 § 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. (October 15, 1914), 38 Stat. 730, 731, c. 323, 15 U.S.C.A. § 15 FCA title 15 § 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Again, in *Moore v. Mead's Fine Bread*, supra, this Court considered a triple damage suit for violations of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, and Section 3 of the latter act, and expressed no doubt but that the civil remedy was equally applicable to both sections. After setting forth the provisions of the section involved, this Court said, page 118:

> "Those sections on their face seem to cover the instant case. Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales. The destruction of a competitor was plainly established, as required by the

amended § 2 (a) of the Clayton Act; and the evidence to support a finding of purpose to eliminate a competitor, as required by § 3 of the Robinson-Patman Act, was ample."

CONCLUSION

We respectfully submit for reasons stated, that the decision of the Court of Appeals, Tenth Circuit, should be affirmed.

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Appendix I

STATUTORY PROVISIONS

The Robinson-Patman Act 49 Stat. 1526

An Act

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., Title 15, sec. 13), is amended to read as follows:

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either

of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide tranactions and not in restraint of trade; And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the foods concerned, such as but not limited to actual or imminent deterioration on perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation this section, and unless justification shall be affirmatively shown, the discriminations: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchase or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Sec. 2. That nothing herein contained shall affect rights

of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on Section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: Provided, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon, the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter, the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully as to the same extent as if such supplementary proceedings had not been taken.

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Sec. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1936.

CLAYTON ACT, SECTION 4,
38 STAT. 731, TITLE 15 USC 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold, the damages

by him sustained, and the cost of suit, including a reasonable attorney's fee."

CLAYTON ACT, SECTION 1,
38 STAT. 730 (1st paragraph)

"That 'antitrust laws' as used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act, entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act."

TITLE 15 USC 12 (1st paragraph)

"'Antitrust laws,' as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title."

Appendix II

The Borah-Van Nuys Amendment.

The Borah-Van Nuys amendment which was offered by Senator Borah as Sec. 2 of the Robinson bill (80 Cong. Rec. 6346) reads as follows (80 Cong. Rec. 6349):

Sec. 2. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Nothing in this section shall prevent a cooperative association from returning to producers or consumers, or a cooperative wholesale association from returning to its constituent retail members, the whole, or any part of, the net surplus resulting from its trading operations in proportion to purchases from, or sales to, the association.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 1 year, or both.

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AUTHORITIES